

EXHIBIT B

1 UNITED STATES DISTRICT COURT

2 WESTERN DISTRICT OF NEW YORK

3 - - - - - X
 4 UNITED STATES OF AMERICA,) 99-CR-6084
) 99-CR-6089
 5 vs.)
)
 6 DENNIS FORBES,)
) 18 U.S.C. 922(g)(1)
 Defendant.) 21 U.S.C. 841(b)(1)(a)
 7 - - - - - X 846; 861(a)(1)

8 Transcript of Proceeding
 9 (Sentencing)
 10 Before the Honorable Charles J. Siragusa
 United States District Judge

11 Tuesday
 12 15 January 2002
 Rochester, New York

13
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17
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21
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 25

P R O C E E D I N G S

* * *

THE COURT: For the record, this is the matter of
United States versus Dennis Forbes.

You are Dennis Forbes?

THE DEFENDANT: Yes.

THE COURT: Mr. Forbes, you're appearing with your
attorney, Mr. Okay; is that correct?

THE DEFENDANT: Yes.

MR. OKAY: Good afternoon, your Honor.

THE COURT: Good afternoon.

The Court notes the presence of Mr. Sherman on
behalf of the government.

Mr. Forbes, this matter is on for sentencing. In
that regard I have received and reviewed the Presentence
Investigation Report prepared by the United States
Department of Probation, initially on July 24th, 2001, and
then revised on November 30th, 2001, and finally on December
21st, 2001.

I've also read carefully Mr. Okay's objections to
the presentence report dated December 27th, 2001, and the
government's statement with respect to sentencing factors,
and a response to your objections to the PSR, which was
dated January 9th, 2002.

Mr. Sherman, have you received and reviewed the

1 Presentence Investigation Report?

2 MR. SHERMAN: Yes, your Honor.

3 THE COURT: Mr. Okay, have you received and reviewed
4 it as well?

5 MR. OKAY: Yes, your Honor.

6 THE COURT: Have you had occasion to go over the
7 presentence report with Mr. Forbes?

8 MR. OKAY: Yes, I have. On several occasions we
9 have gone over it in detail, your Honor.

10 THE COURT: Mr. Forbes, have you read the report
11 yourself?

12 THE DEFENDANT: Yes.

13 THE COURT: I do note that you have made five
14 objections to the Presentence Investigation Report. Before
15 proceeding any further I will address them in the order they
16 were listed in your objections to the Presentence
17 Investigation Report.

18 At the outset the Court does note in resolving these
19 objections it is, of course, well settled to rule against
20 the defendant the government must generally establish the
21 disputed allegations in the presentence report by a
22 preponderance of the evidence, United States versus Lee,
23 818 F.2d 1052 at page 1057, a 1987 Second Circuit case,
24 cert. denied 484 U.S. 956, a 1987 case.

25 Further, it has long been established that hearsay

1 evidence is admissible at a sentencing hearing,
2 United States versus Weinberg, 852 F.2d 681 at 685, a 1988
3 Second Circuit case.

4 More specifically, the Court may, in reaching its
5 decision, rely on hearsay statements contained in a
6 Presentence Investigation Report as well as other hearsay,
7 as long as such hearsay has adequate indicia of reliability;
8 United States versus Carmona, 863 F.2d 569, at 564, a 1989
9 Second Circuit case.

10 First, Mr. Forbes, you object to paragraph 26 of the
11 Presentence Investigation Report which characterized Brett
12 Harrington as a victim in what is called the overall conduct
13 of the offense. You list several reasons: Because this was
14 not a homicide; no homicide issue of fact is presented in
15 the evidence or to the jury; that there is no mention of the
16 death of Brett Harrington in the PSR; and while the senior
17 probation officer refers to Brett Harrington as a victim in
18 the overall conduct of the offense, Winston Banner, who has
19 been accused of another homicide and who was the alleged
20 victim in Count 3 of the superseding indictment, is nowhere
21 in the PSR described as a victim of Dennis Forbes.

22 As to this objection, the Court determines that
23 pursuant to Federal Rule of Criminal Procedure 32(c)(1), no
24 finding is necessary because the controverted matter will
25 not be taken into account in, or will not affect, your

1 sentencing in any way.

2 Turning to your next objection, you object to
3 paragraph 30 of the Presentence Investigation Report, which
4 calculates your base offense level at 38 and lists a number
5 of reasons, which I will go through now.

6 First, you contend the facts indicate the jury
7 verdict form detailed, as to Count 1 of the second
8 superseding indictment, that you were linked to more than 50
9 grams of cocaine base.

10 Next, you say that the senior probation officer
11 alleges in conclusory fashion, based upon the flawed
12 analysis of the statements of Kevin Pierre and Winston
13 Banner, which were not part of the evidence before the trial
14 jury, that Dennis Forbes can be linked to the possession and
15 movement of 1.5 kilograms or more of cocaine base in this
16 District.

17 Next, you indicate the senior probation officer's
18 methodology is improper because it presupposes that on every
19 single day during the period described in the indictment the
20 same quantity of drugs were sold, and such a 100-percent
21 efficiency rating is improbable in the realm of reality.

22 Next, you indicate no evidence of the movement of
23 kilogram quantities of cocaine base by Dennis Forbes was
24 presented to the trial jury, and there is absolutely nothing
25 in the jury form to indicate other than a link to more than

1 50 grams of cocaine base.

2 Next, you say the Supreme Court recent opinion in
3 Apprendi versus New Jersey, and versus United States, 120
4 S.Ct. 2348, 2000, holds that any fact that increases the
5 maximum penalty for a crime must be charged in the
6 indictment, submitted to a jury, and proven beyond a
7 reasonable doubt.

8 Next, you argue the conclusions of the senior
9 probation officer in paragraph 30 are not conclusions of the
10 trial jury based upon the evidence at trial, and it is the
11 position of the defense that the base offense level should
12 be 32.

13 The Court disagrees with your position, Mr. Forbes,
14 and agrees with the presentence report and finds by a
15 preponderance of evidence that, pursuant to United States
16 Sentencing Guidelines Section 2D1.1(c)(1), a base level of
17 38 is appropriate.

18 In that regard, the Court specifically credits as
19 reliable Kevin Pierre's statements to the police that he
20 sold at least \$500 worth of cocaine base a day for you for
21 two years. The Court further finds that based upon the
22 experience of law enforcement officials cocaine is generally
23 sold in \$10 bags weighing approximately one gram each;
24 therefore, Pierre sold 3.5 kilograms, or 3,500 grams during
25 the period encompassed in the Count 1 conspiracy for which

1 you stand convicted.

2 MR. SHERMAN: Your Honor, I'm sorry. I think you
3 said "one gram each," and I think the finding in the PSR was
4 one-tenth of a gram --

5 THE COURT: I thought I said one-tenth of a gram.
6 The Court's notes do indicate one-tenth of a gram each.

7 Therefore, Pierre sold about 1.5 kilograms, or 3,500
8 grams, in the period encompassed in Count 1 in the
9 conspiracy, for which, Mr. Forbes, you stand convicted.
10 This is obviously more than the 1.5 kilogram minimum
11 required for a base level of 38.

12 Moreover, the Court finds, specifically based upon
13 the trial testimony, that the conduct of Pierre was
14 certainly within the scope of the conspiracy for which you
15 were convicted. Additionally, the Court finds that you were
16 the leader/organizer of the Count 1 conspiracy; and
17 therefore, Pierre's conduct was foreseeable to you. See
18 United States versus Hernandez-Santiago, 92 F.3d 97, page
19 1000, a 1996 Second Circuit case.

20 The Court makes all its findings by a preponderance
21 of evidence.

22 Your reliance on Apprendi is misplaced since your
23 statutory maximum of life is not being increased by the
24 Court's sentencing determination as to drug quantity.
25 Rather, the jury found beyond a reasonable doubt that you

1 conspired to possess with intent to distribute and to
2 distribute 50 grams or more of cocaine base, which
3 establishes the maximum sentence at life. Therefore, the
4 preponderance of evidence standard properly applies to the
5 Court's determination of a base level of 38.

6 Third, you object to the upward adjustment in
7 paragraph 31 for specific offender characteristics pursuant
8 to United States Sentencing Guideline 2D1.1(b)(1), which you
9 indicate such section is nowhere to be found in the
10 guideline.

11 You claim the facts indicate the conspiracy was
12 alleged to have existed in this District between July of
13 1998 and July of 1999.

14 You say the facts indicate that Dennis Forbes was
15 found to be in possession of a firearm at the time of the
16 automobile stop on August 11th, 1999, after the conspiracy
17 had ended.

18 You argue the defense notes that there is no proof
19 that Dennis Forbes was found to be in possession of a
20 firearm at the time of the automobile stop on August 11th,
21 1999, after the conspiracy had ended.

22 You say the trial jury was unable to reach a verdict
23 as to Count 2; and therefore, the two-level enhancement
24 cannot be applied to increase the maximum penalty, citing
25 Apprendi.

1 You argue the defense notes, en passant, that the
2 senior probation officer on page 5, paragraph 9, makes
3 reference to indictment 99-CR-6084 and alleges that Dennis
4 Forbes possessed a handgun as a felon on September 9th,
5 1999, when in fact the automobile stop which gave rise to
6 the charges occurred on August 11th, 1999.

7 Finally, you argue that the felon in possession
8 conviction by plea cannot be used to support the two-level
9 enhancement because the date of August 11th, 1999, falls
10 outside the time frame of the charged conspiracy.

11 However, the Court finds by a preponderance of
12 evidence that the enhancement applies.

13 At the outset, the Court notes despite the failure
14 of the jury to a verdict on Count 2 of the second
15 superseding indictment, the Apprendi rule will not be
16 implemented in the Court's finding as to possession of a
17 dangerous weapon since this finding will not result in a
18 sentence on a single count above the statutory maximum for
19 that count; United States versus Breen, 243 F.3d 591 at page
20 598 through 599. Breen is a 2001 Second Circuit case.

21 In this regard, the Court bases its determination of
22 the appropriateness of the two-level increase upon the
23 evidence that was presented at trial, including your own
24 statements, as well as other reliable hearsay before the
25 Court.

1 For example, you admitted in your statements given
2 on August 11th, 1999, that you had been in possession of a
3 gun during the period of the conspiracy. In addition,
4 weapons were twice found by the police at 82 Eddy Street,
5 one of the drug houses that you ran during the time of the
6 conspiracy.

7 On one occasion, July of 1998, police found a
8 shotgun there while investigating an illegal cable
9 television connection matter. The second time was on
10 September 29th of 1998 when the police arrested co-defendant
11 Damon Shallow at that location; they found in the residence
12 a .22 caliber long rifle as well as a loaded .22 caliber
13 semi-automatic pistol and a .22 caliber revolver that was
14 loaded.

15 At sentencing in this matter Shallow did acknowledge
16 that he was selling drugs for you out of 82 Eddy Street at
17 the time of his arrest, and did so indicate under oath.

18 So as indicated, the Court finds by a preponderance
19 of evidence that the enhancement applies.

20 Fourth, you object to paragraph 33 of the
21 Presentence Investigation Report because the senior
22 probation officer's unsupported conclusions, once again,
23 accuse Dennis Forbes of being an organizer of more than
24 five.

25 The reasons you list are Dennis Forbes is accused

1 along with two others; Winston Banner does not say anything
2 about working for Dennis Forbes between July of 1998 and
3 July of 1999; Kevin Pierre said that he hustled for Dennis
4 Forbes and that a kid named Bugs worked at York, too;
5 assuming that Bugs is Winston Banner, that a paucity of
6 evidence that Dennis Forbes was the an organizer of more
7 than five.

8 The senior probation officer mentions Damon Shallow,
9 Kevin Pierre, Winston Banner, Terrance Melford, and Jamal
10 McGregor as all working for Dennis Forbes. That is five
11 people. Not more than five people is required by the
12 statute.

13 There's no evidence in the trial record to support
14 the senior probation officer's contention that Dennis Forbes
15 was an organizer as opposed to a manager as defined in the
16 guidelines; and finally, you say, accordingly the Court is
17 inclined to conclude that Dennis Forbes was an organizer and
18 manager, then the two-point enhancement should be utilized.

19 Again, the Court disagrees with your position and
20 finds by a preponderance of evidence introduced at trial
21 that you, pursuant to Guidelines Section 3B1.1(a), were an
22 organizer or leader of criminal activity that involved five
23 or more participants or was otherwise extensive.

24 The Court finds based upon the proof at trial by a
25 preponderance of evidence, that you were the organizer of

1 the drug conspiracy or leader for which you were convicted
2 and that it involved at least you, Winston Banner, Kevin
3 Pierre, Terrance Melford, Jamal McGregor, and Damon Shallow.

4 Finally, you object to paragraph 48 of the
5 presentence report stating that you obstructed justice
6 simply because you moved to withdraw your guilty plea under
7 indictment 99-CR-6084.

8 I should note this ruling is not going to impact on
9 anything since it relates to the possession of a weapon by a
10 felon, and as the presentence report accurately states, the
11 guideline determination on the conviction on the first
12 indictment controls. The Court will nonetheless rule on it.

13 Your specific objection goes to the following: The
14 senior probation officer states, "The defendant pled guilty
15 under oath and later under oath presented information to the
16 Court in order to withdraw his guilty plea. That means on
17 one of these occasions he lied to the Court and committed
18 perjury."

19 You indicated one of the primary issues in a guilty
20 plea is whether the plea is knowing, voluntary, and
21 intelligent.

22 One of the primary issues of perjury is always
23 materiality.

24 You go on to say the senior probation officer does
25 not mention materiality in paragraph 48 or whether any of

1 the lies supposedly told to the Court in any way related to
2 any of the elements of the felon-in-possession charge.

3 And finally, for the foregoing reason the two-level
4 enhancement should not be applied.

5 Despite the defense contentions, the Court finds by
6 clear and convincing evidence that the enhancement applies.

7 Section 3C1.1 provides for this enhancement where a
8 defendant willfully obstructs or impedes or attempts to
9 obstruct or impede the administration of justice during the
10 investigation, prosecution, or sentencing of the instant
11 offense of conviction. This Circuit in United States versus
12 Ben-Shimon, 249 F.3d 98, page 102 to 103, a 2001 Second
13 Circuit case, relying on the United States Supreme Court
14 decision in United States versus Dunnigan, 507 U.S. 87 at
15 page 95, a 1993 Supreme Court case, held that if a defendant
16 objects to a sentence enhancement for perjury, a district
17 court must review the evidence and make independent findings
18 necessary to establish a willful impediment to or
19 obstruction of justice or an attempt to do the same under
20 the perjury definition set out in Dunnigan.

21 The definition relates to the federal perjury
22 statute and is as follows: "A witness testifying under oath
23 or affirmation violates the federal criminal perjury statute
24 if he or she gives false testimony concerning a material
25 matter with the willful intent to provide false testimony,

1 rather as a result of confusion, mistake, or faulty memory."

2 Moreover, the Circuit in Ben-Shimon, advised that in
3 determining whether an enhancement for obstruction of
4 justice is required, it is sufficient if the district court
5 makes a finding of an obstruction of, or the impediment to,
6 justice that encompasses all of the factual predicates for a
7 finding of perjury, but that it is preferable for a District
8 Court to address each element of the alleged perjury in
9 separate and finding.

10 Therefore, in this Circuit, as Ben-Shimon makes
11 clear, enhancement for obstruction of justice based on
12 perjury may be imposed only where the sentencing court finds
13 that the defendant willfully and materially committed
14 perjury, which is the intentional giving of false testimony
15 as to a material matter; United States versus Zagari, 111
16 F.3d, 307 at 329, a 1997 Second Circuit case.

17 That is to say, perjury is committed "willfully"
18 where it is made for the specific purpose of obstructing
19 justice, and "materially" where it is material to the
20 proceeding in which it is given.

21 Moreover, it is well settle that obstruction of
22 justice findings relating to perjury must be made by clear
23 and convincing evidence, United States v. Kelley, 142 F.3d,
24 172 at 178, a 1998 Second Circuit case.

25 Applying these principles of law to this case, the

1 Court does find by clear and convincing evidence that you
2 perjured yourself, and that the two-point upward adjustment
3 applies.

4 In reaching its decision the Court relies on the
5 following: The plea allocution on January 24th, 2001, in
6 which you told me that you wanted to plead guilty. You were
7 placed under oath at that time. You acknowledged that you
8 had discussed pleading guilty with your then lawyer, Mr.
9 Schiano. You indicated to me that you believed it was in
10 your best interest to plea guilty to the charge. You stated
11 that you had enough time to consult with your lawyer and
12 that you were satisfied with Mr. Schiano's advice and
13 representation. You said that your decision to plead guilty
14 was based in part upon the government's representation that
15 it would dismiss the charge upon which the jury hung at
16 trial; that is, the possession of a weapon in furtherance of
17 drug trafficking.

18 You told me that you didn't have any questions, and
19 you indicated to me that you answered my questions
20 truthfully. I further asked you, and you acknowledged, that
21 you were not threatened and that other than the promises
22 discussed no promises had been made to you to plead guilty;
23 that is, other than the indication that the government would
24 dismiss the charge upon which the jury was hung.

25 The process of ultimately withdrawing your plea was

1 a long one. I advised you repeatedly of the down side of
2 withdrawing your plea. I advised you if you submitted a
3 statement to me which contradicted the testimony that you
4 gave under oath, that it could result in an enhancement for
5 obstruction of justice.

6 I discussed with you the wisdom of proceeding. I
7 assigned you new counsel who told you the same thing; and
8 ultimately when you persisted I cautioned you that a lawyer
9 could not ethically bring your motion if he thought there
10 was no good-faith basis to do so. That, of course, resulted
11 in my relieving the lawyer who I appointed, Mr. Wicks, and
12 allowing you to proceed pro se to bring the motion.
13 However, this record is replete with warnings given to you
14 by the Court that you would be subjecting yourself to this
15 potential enhancement if you persisted and submitted a
16 statement contrary to your sworn testimony when you pled
17 guilty.

18 So the Court finds by clear and convincing evidence
19 that you willfully committed perjury when you indicated to
20 the Court that your plea was essentially coerced by Mr.
21 Schiano. You did it with a specific purpose of obstructing
22 justice; that is, it was certainly material to the
23 proceeding, and it was clearly intentional on your part.

24 As I said, you were questioned very carefully, and
25 to the extent that you now allege that the plea was coerced,

1 that you didn't know what you were doing, that it wasn't
2 voluntarily, that makes the sworn testimony that you gave at
3 your allocution perjurious. The Court finds that by clear
4 and convincing evidence; and therefore, this enhancement is
5 appropriate based upon the Court's determination that -- at
6 least according to your latest statement -- it means you
7 perjured yourself when you took the plea under oath at the
8 time you were represented by Mr. Schiano.

9 However, as I indicated in the last analysis, it's
10 not going to make any difference.

11 I do note, however, that you filed your motion --
12 finally filed it -- on September 26th, 2001, and you claimed
13 in your papers that you entered into a plea which was
14 neither knowing, intelligent, nor voluntarily which resulted
15 from confusion about what you were plead guilty, due to your
16 lawyer advising you that you would be pleading guilty to
17 Count 2 of Indictment 99-CR-6089 and not to Indictment
18 99-CR-6084, which makes absolutely no sense because then you
19 would be pleading guilty to the possession-in-furtherance
20 crime, which the jury hung on, which would mean you would
21 have to get a minimum of -- I think in your case -- 10 more
22 years in jail. It makes no sense.

23 As I said, your withdrawal affidavit directly
24 contradicts what you said under oath at your plea and also
25 contradicts -- strike that, your withdrawal plea contradicts

1 what you said to this Court under oath; so accepting this
2 contradiction, it means that clearly at some point you're
3 not being truthful to this Court.

4 I did make specific findings when I declined to
5 withdraw the motion, that they were inherently incredible.

6 I mean, you told me -- I'm trying to recollect, but
7 because of the contradictory nature of the statements you
8 did indicate to me that you didn't tell the truth when you
9 entered your guilty plea. I think that was your statement
10 to me in the court as I recall. So there can be little
11 question in the Court's mind that this enhancement applies.

12 However, as I repeat for the third time, it really
13 doesn't make any difference since it's not going to impact
14 in any way on your sentencing.

15 Mr. Sherman, does the government move for sentence?

16 MR. SHERMAN: Yes, your Honor.

17 THE COURT: Do you have anything to say?

18 MR. SHERMAN: Only, your Honor, that obviously the
19 guideline calculation you just affirmed subjects Mr. Forbes
20 to the ultimate sentence that this Court can give, which is
21 life imprisonment; and to the extent anybody viewing this
22 record would think that sentence was somehow inappropriate,
23 I just want the record to reflect, as the Court is well
24 aware, through a number of different indictments that have
25 been before this Court it's been established that Mr. Forbes

1 was not only the organizer of the five other people that the
2 Court mentioned, but interacted with at least 10 or 15 other
3 people who have been before this Court either in the status
4 of a defendant or a witness.

5 It's also clear from his conviction on Count 3 that
6 Mr. Forbes had a very negative impact on a number of young
7 people, including Winston Banner. The evidence has been
8 clear through all these prosecutions that Mr. Forbes was
9 responsible for recruiting teenagers to come up to Rochester
10 from New York City to sell drugs; and certainly, to that
11 extent he's responsible for not only ruining those people's
12 lives in terms of subjecting them to prosecution, but
13 ultimately that in the course of the time period of this
14 conspiracy we are aware that at least two people have been
15 hurt.

16 It's entirely appropriate in the government's view
17 that in light of the fact that Mr. Forbes has never accepted
18 responsibility for any of his actions he does in fact
19 receive a life sentence.

20 THE COURT: Thank you, Mr. Sherman.

21 Mr. Okay, do you wish to say anything on behalf of
22 Mr. Forbes before the Court passes sentence?

23 MR. OKAY: Your Honor, I would just point out, as my
24 colleague for the government has indicated, Mr. Forbes,
25 based on the finding that this Court has made and the

1 findings that the Court made at the time of the denial of
2 the application to withdraw his guilty plea, he faces the
3 ultimate sentence under the guidelines, life imprisonment.
4 He's at level 45 in the criminal history category of III.
5 There's not much room to maneuver there.

6 Your Honor, I didn't try this case and I wasn't
7 present at the time of the guilty plea or the time that the
8 application to withdraw was before the Court, so I don't
9 really have much to say. I haven't even seen the trial
10 transcript.

11 I was having a conversation before you came out here
12 with Mr. Lyons, and I was talking to him about the
13 sentencing guidelines; and I always go back in these federal
14 cases, in a case under guidelines, I always go back to the
15 language of the commission. One thing that strikes me now,
16 as I recall, is the commission's view that each defendant
17 who comes before the Court for sentencing presents a unique
18 study in the human failings that either mitigate nor magnify
19 the crime and punishment to ensue.

20 I know the Court can appreciate that, but, your
21 Honor, my hands are tied. The Court has made its findings.
22 We are bound to respect those findings. We are at level 45
23 with a criminal history category of III. I don't know what
24 else to say. We made our objections. The Court has made
25 his findings.

1 I do know Mr. Forbes would like to make a statement
2 to the Court, if the Court will permit it.

3 THE COURT: Certainly. First of all, though, I want
4 to thank you, Mr. Okay, for taking the assignment, and I
5 know you'll be handling the appeal; and thank you for the
6 fine job you've done in the representation of Mr. Forbes at
7 the time of sentencing. The Court certainly recognizes the
8 time and effort you put into the case so far and appreciates
9 what I know will be the continued effort you will put in for
10 Mr. Forbes' appeal. I just wanted to take the time to give
11 you the Court's appreciation for what you've done.

12 Mr. Forbes, the law does permit you to make a
13 statement to me before I pass sentence, so go ahead.

14 THE DEFENDANT: I'm about to read. It might take
15 some time, so...

16 THE COURT: Go ahead, Mr. Forbes.

17 THE DEFENDANT: December 22nd, 1998, Dennis Forbes
18 was in the hospital with a bullet wound that went through
19 his hip and lodged in the waist. Officer Tom Janus said
20 that Dennis Forbes made a statement admitting a homicide.
21 Dennis Forbes retained lawyer Tom Cuzzi and told him what
22 took place with him and the Officer while he was in
23 Intensive Care unit. Tom Cuzzi told Dennis Forbes that the
24 Officer violated his rights by asking him questions when
25 you're in that kind of condition.

1 Dennis Forbes' lawyer got on the phone and called
2 Tom Janus and told him that he was Dennis Forbes' lawyer and
3 not to have any contact with his client unless he's notified
4 in advance.

5 During the same time, Tom Janus notified INS that
6 Dennis Forbes was shot and that he was in the hospital, and
7 the INS did nothing.

8 On July 11, 1999, Curtis Crawley was shot and
9 killed. His cousin made two statements to Tom Janus. One
10 is that he did not recognize who shot his cousin. Two days
11 later Tom Janus again questioned the witness who then
12 changed his mind and told Janus that he recognized who it
13 was.

14 On August 2nd, 1999, Dennis Forbes' home was under
15 police surveillance. Dennis Forbes pulled in the parking
16 lot and parked and him and Conroy Porchman stepped out of
17 the car and went to Dennis Forbes' house in Grecian Gardens,
18 Greece, New York. They stayed in the house until Dennis
19 Forbes took a shower and changed.

20 When they left there, RPD followed their car. After
21 following for a few miles they were pulled over by Rochester
22 Police Department officers. They were ordered out of the
23 car at gunpoint. The first person to exit the vehicle was
24 the passenger, Conroy Porchman. Dennis Forbes, who was the
25 driver, was also ordered to step out of the vehicle while

1 looking into the muzzle of a shotgun. The officer yelled,
2 "Keep your hands up and use one hand to open the door. Get
3 out and lay on the ground." While being on the ground
4 Dennis Forbes was searched and a gun was found on his person
5 in his left front pocket.

6 Dennis Forbes was taken to the interrogation room
7 and handcuffed to the table. Dennis Forbes asked if he
8 could make a call to speak to his lawyer, Tom Cuzzi. The
9 officer said no and left the room.

10 Dennis Forbes fell asleep for a few moments and was
11 awakened by an officer who was typewriting while Officer
12 Janus is asking questions about Conroy Porchman and Kevin
13 Pierre. Officer Janus told Dennis Forbes that there was a
14 shoot-out between Curtis Crawley and Conroy Porchman on July
15 4th. Where were you. Dennis Forbes told the Officer he was
16 in New York City to Christmas with a newborn daughter.
17 Dennis Forbes told the Officer he heard about it because a
18 lady told him about it, and he have a videotape to prove
19 where he was that day.

20 The Officer then said you hear -- the Officer then
21 said did you hear that Curtis was killed the other day? Did
22 you hear about it? Dennis Forbes says yes. The Officer
23 said how did you know? A friend in the neighborhood told
24 me, plus it was on the news.

25 Janus said people said they seen your car in the

1 neighborhood with Kevin and Conroy the day he was killed.
2 Dennis Forbes told the Officer he gave them a ride to the
3 store the other day. They -- meaning Kevin and Conroy --
4 was walking on Silver and Eddy Street. That stopped Dennis
5 Forbes' car and asked if he could give them a ride to the
6 store to buy beer and blunt. He dropped them at the store
7 and bought a beer for himself, left them at the store and
8 went to his brother's store at "Shylock". He was there for
9 about 20 minutes and left.

10 The Officer asked where did you drive -- where did
11 you drive? The officer asked where did you drive? Dennis
12 Forbes said "Shylock" and turned down Appleton. Dennis
13 Forbes saw Kevin and Conroy walking down Appleton Street.
14 They asked Dennis Forbes to give them a ride. The Officer
15 asked where did you drop them off. I told them Eddy and
16 Silver Street. The Officer asked what were they wearing?
17 Dennis Forbes told the officers what they were wearing.
18 They asked -- the Officer asked did they look nervous. I
19 said no.

20 "Did you see a bulge?"

21 I said no.

22 "Were they speeding?" I said no.

23 "Did you see a gun?" I said no.

24 "Did they tell you they shot someone?" Dennis

25 Forbes looked at the Officer and said, "If you shot someone

1 would you tell anyone?"

2 Then he -- then the Officer got upset and said,
3 "Just tell us that Kevin and Conroy killed Curtis and we
4 will forget about the gun you got arrested with." Dennis
5 Forbes told the Officer he was not there and he did not
6 know. They insisted that I tell them.

7 Then finally Officer Janus said, "You don't want to
8 work with us. You don't want to work with us. You will
9 f'ing see." He exited the room and two other men entered
10 the room and introduced themselves. "We are Immigration
11 Officers Garcia and Waugaman, but sign this paper so you
12 know who we are."

13 Dennis Forbes signed. They said tell the officers
14 what they want to know and you wouldn't have to worry about
15 us. Dennis Forbes responded, "I'm not going to lie on
16 people because I was not there."

17 Then they said, "Tell us what happened when you were
18 stopped in your car." I did. They exited the room. Dennis
19 Forbes looked out the window. It was dark outside. The
20 door opened. Dennis Forbes was escorted to a phone. He
21 tried to call his lawyer, but there was no answer. He then
22 called his wife and asked her the time. She said it was
23 after 7 p.m.

24 Then he told his wife he was arrested. She said
25 "When?" I said, "After I left the house." She said she

1 went to the store, and when she entered the house the door
2 was off the hinges and the police were in the house. Dennis
3 Forbes hangs up the phone and was taken by INS to Batavia.

4 In September of '99 I was indicted on conspiracy
5 charges along with Kevin Pierre and Conroy Porchman. The
6 indictment was superseded along with Dennis Forbes, Kevin
7 Pierre and Damon Shallow. The case agent was Tom Janus.
8 Tom Brennan was a narcotics investigator.

9 At the suppression hearing Officer Janus testified
10 that the stop of my vehicle and the search of my person was
11 justified because I was with Conroy Porchman who they wanted
12 to question about a homicide. Nothing indicated that I knew
13 anything about what Conroy Porchman knew, what I was asked
14 about. Also, at the time there was no warrant mentioned
15 about Dennis Forbes for him at the stop. The Officers
16 justified the search of my person by saying they have to
17 secure themselves.

18 The crime that Mr. Pierre was later convicted on
19 happened one month, which is 7/8/99, prior to the stop of
20 August 11th, 1999.

21 After not being arraigned until two months on the
22 arrested charges the officer testified that I had an INS
23 warrant. At the suppression hearing Agent Garcia testified
24 that he received a phone call from Officer Tom Janus if he
25 could come and talk to Dennis Forbes. Nothing was mentioned

1 about an INS warrant. There was no indication during the
2 conversation of the mention of an INS warrant now dated
3 August 9th of 1999, but on August 11th, 1999, when I was
4 arrested, there was no INS officer present when I was
5 stopped and taken out of my vehicle.

6 Agents Garcia's purpose was to come and talk to me
7 about cooperating with the police officers, so there should
8 have been no intervening period between my arraignment and
9 arrest.

10 On October 5th, 2001, the Judge, U.S. Attorney,
11 and -- and the U.S. Attorney turned down my motion to
12 withdraw my plea. One of the reasons for denial of
13 withdrawal of plea was due to the fact that since I had an
14 INS charge they were justified in not arraigning me within a
15 normal 72-hour period, even though my arraignment was not
16 until two months after I was initially arrested on August
17 11th, 1999.

18 Under INS regulation directive of August 7th, 1969,
19 only designated INS officers are authorized to make an
20 arrest and the list of designated immigration officers is
21 set forth in 8 CSR, Section 2875(c)(1)-(5), and the arrest
22 can be made only when immigration officers have reason to
23 believe that the person to be arrested has committed an
24 offense going against the United States or is an alien who
25 is in the United States illegally. Whenever possible a

1 warrant must be obtained prior to the arrest.

2 At the time of the arrest the designated immigration
3 officer must, as soon as practicable and safe to do so,
4 identify himself or herself as an immigration officer
5 authorized to execute a warrant and state that the person is
6 under arrest and the reason for the arrest.

7 With respect to an alien arrest and administrative
8 charge of being in the United States in violation of the
9 law, the arresting officer must adhere to the procedure set
10 forth in 8 CFR, Section 273. If the arrest is made without
11 a warrant and the procedure set forth, Section 242(c)(2) --
12 8 CFR. If the arrest is made with a warrant, with respect
13 to a person arrested and charged in violation of the law of
14 the United States, the arresting officer must advise the
15 person of the appropriate rights as required by law.

16 At the time of the arrest or as soon thereafter as
17 practicable it is the duty of the immigration officer to
18 ensure the warning is given in a language the arrestee
19 understands and that the arrestee acknowledges that the
20 warnings are understood. The fact a person has been advised
21 of his or her rights must be identified on the arrest form
22 and made part of the arrest.

23 THE COURT: Mr. Forbes, I want to let you say
24 whatever you want to say, but we're not going on with you
25 reading a statute to me. If there's something you want to

1 say about sentencing I want to give you every opportunity,
2 and throughout the proceeding I've tried to be patient with
3 you. As I've told you on previous occasions, I've spent
4 more time with you than any other defendant.

5 I don't know what you're reading from, but you're
6 not here to read the law. If you want to say something to
7 me pertinent to your sentencing, go ahead.

8 In fact, I'll even let you continue if you're going
9 to wrap it up.

10 THE DEFENDANT: Yes, I'm going to wrap it up.

11 THE COURT: Go ahead.

12 THE DEFENDANT: I was detained illegally and my due
13 process rights violated by INS Officers Garcia and Waugaman.
14 Upon my arrest RPD took me into custody. RPD never
15 arraigned me and took me and turned me over to INS who put
16 me the custody of you. The marshals never took me to be
17 arraigned during the time I was arrested. At the time of my
18 interview with Garcia and Waugaman, the only thing said to
19 me by the agents were, "We are INS agents. Please sign
20 these papers so you know who we are." There was no mention
21 of INS warrant. All they asked is what happened when I got
22 stopped in my car and tell the police what they want to hear
23 and you don't have to worry about us.

24 I never signed a statement they claim I signed.
25 Those are not my signatures. I am willing to take a

1 polygraph test to prove my innocence if necessary or
2 evidentiary hearing.

3 And last but not least, my entire INS file was
4 issued and presented improperly. When Dennis Forbes was
5 arrested there was no mention of an INS warrant and no
6 warrant was given to me. Under Section 7.4 of the
7 immigration law an order of arrest must be accompanied with
8 the order to show cause required to be served and filed with
9 the immigration court.

10 This clearly shows that -- this clearly shows that
11 the police officers and INS were acting in concert, by
12 acting in concert to charge me for the crime I'm convicted
13 on now, which is conspiracy.

14 During the trial, your Honor, before Mr. Melford
15 took the stand, my mother, who was outside because she was a
16 witness -- well, my mother -- before Mr. Melford took the
17 stand my mother, who was seated outside the courtroom, saw
18 John Brennan grab Mr. Melford by the neck, and she said she
19 heard Mr. John Brennan tell Mr. Melford he better do what
20 he's told; and I would like to make that statement for the
21 record.

22 THE COURT: Thank you, Mr. Forbes.

23 The Court is prepared to pass sentence on you, Mr.
24 Forbes. Before the Court does, however, I'm going to
25 reverse myself on one issue, although it's academic, and

1 that is the enhancement the Court found for perjury.

2 I had occasion to review the statement from
3 September 26th, 2001, and it's not sworn to.

4 MR. SHERMAN: It's notarized.

5 THE COURT: I don't know if that makes a sworn
6 statement.

7 MR. SHERMAN: I think --

8 THE COURT: It doesn't bear -- all it is, is
9 notarized, which means the notary is acknowledging the
10 defendant's signature.

11 MR. SHERMAN: Your Honor, apart from that, with
12 regard to the -- two things. With regard to the obstruction
13 enhancement, apart from perjury, making false statements to
14 the Court is also a grounds under 3C1.1 to give someone the
15 enhancement, apart from whether it's perjury or not.

16 THE COURT: Direct my attention to that section, Mr.
17 Sherman, because I do note --

18 MR. SHERMAN: I mean the commentary --

19 THE COURT: Direct my attention to it, because I do
20 note that the Court was operating under the mistaken
21 impression that the statement that Mr. Forbes submitted was
22 an affidavit; and frankly, it is not sworn to. It bears a
23 signature of a notary public, which just means that Mr.
24 Forbes did sign the statement. So direct my attention to
25 the section you're talking about.

1 MR. SHERMAN: This is in the application of 4F, your
2 Honor, providing materially false information to a judge or
3 magistrate, whether or not it's sworn, is a grounds for the
4 enhancement.

5 Not only are the matters that we've already
6 discussed within the scope of that provision, but I would
7 submit that Mr. Forbes just a moment ago provided this Court
8 with materially false information, because unless I misheard
9 him he just stated that the signatures that are found on
10 Government Exhibit's 3 and 3A from the trial, which I have
11 in front of me, do not bear his signature; and there's
12 certainly a basis -- and I think there was testimony about
13 it at the trial; but certainly the Court can find right now
14 that, that statement was false.

15 (There was a pause in the proceeding.)

16 THE COURT: The Court is not going to find for an
17 enhancement. You may be right, Mr. Sherman. The Court, I
18 might add, is proceeding under -- at least in the
19 government's submission you refer to an affidavit given by
20 the defendant.

21 The Court is not going to apply the enhancement.
22 It's academic. It doesn't matter; and to the extent it
23 eliminates, even arguably, an appeal issue, the Court
24 determines it's the wiser course.

25 There would never be an enhancement for perjury

1 where the clear and convincing standard applies because any
2 time the defendant purportedly submitted a false statement
3 the Court could, instead of proceeding under the clear and
4 convincing standard, could say that the defendant was
5 providing false information to the Court so the
6 preponderance of evidence standard applies.

7 You may well be right; however, the Court is not
8 sure at this point. Since it is academic and makes no
9 difference, the Court is going to reverse itself on this
10 point; and the reason I am, so the record is clear, is the
11 Court was operating under the belief that Mr. Forbes did
12 submit a sworn statement controverting one, which the Court
13 believes was the truthful rendition, that he gave during his
14 plea colloquy.

15 However, a closer examination of what Mr. Forbes
16 submitted indicates merely that he signed it, and underneath
17 it, it bears a signature by a notary public. There's no
18 language "sworn to." So the Court, to that extent, is
19 reversing itself.

20 Other than that, the Court's rulings stands.

21 The Court is prepared to pass sentence on you. In
22 that regard, Mr. Forbes, I have had the opportunity to
23 review the revised Presentence Investigation Report prepared
24 by the United States Department of Probation, along with
25 other submissions to which I've already referred. I've

1 listened carefully to what Mr. Sherman said on behalf of the
2 government, to what Mr. Okay said on your behalf, and to
3 what you said yourself.

4 You stand before me, Mr. Forbes, I believe you are
5 now 34 years old, convicted on November 17th, 2000, after a
6 jury trial with respect to indictment 99-CR-6089, of Count 1
7 of the subject indictment; that is, the Class A felony of
8 conspiracy to distribute and possess with intent to
9 distribute marijuana and 50 grams or more of cocaine base,
10 in violation of the Title 21 of United States Code, Section
11 841(b) (1) (A) and Section 846; as well as Count 3, the
12 Class A felony of use of a minor to distribute marijuana and
13 cocaine base, in violation of the 21 United States Code
14 Section 861(a) (1).

15 Additionally, on January 24, 2001, you appeared
16 before me and plead guilty to the 99-CR-6084, charging you
17 with unlawful possession of a firearm by a convicted felon
18 in violation of 18 U.S.C., Section 922(g) (1). You did that
19 without the benefit of a plea agreement.

20 As the record speaks very clearly, you attempted to
21 withdraw that plea; however, the Court found, based on a
22 very clear allocution, that the motion to withdraw your plea
23 was properly denied.

24 It appears from an examination of your record, Mr.
25 Forbes, that you have four prior criminal convictions. On

1 September 2nd, 1987, you pled guilty to attempted criminal
2 sale of a control substance in a third degree, which is a
3 Class C felony under New York law, and received what is
4 referred to as shock probation; that is, a period of
5 incarceration with five years probation to run concurrently.

6 Then on August 7th of 1990 you pled guilty in
7 Rochester City Court to a Class A misdemeanor of resisting
8 arrest and were sentenced to six days in jail.

9 THE DEFENDANT: Excuse me, your Honor. I wasn't
10 sentenced to jail. I was just given community service.

11 THE COURT: I may have misread the presentence
12 report; and the last thing I want, Mr. Forbes, is to make a
13 misstatement.

14 The presentence report does reflect the fact that
15 you got six days in jail, but to the extent that you're
16 making an objection to that, I'll allow you to make the
17 objection; and the Court will indicate to you whether you
18 got six days or not is irrelevant, and to the extent that
19 you object to that the Court will not take that into
20 consideration in sentencing. However, it is clear that you
21 did plead guilty to resisting arrest.

22 MR. SHERMAN: Your Honor, since we're now on this,
23 before you pronounce sentence, and just in case at some
24 point it matters, the Court will recall that the government
25 filed an 851 information prior to trial.

1 THE COURT: I do.

2 MR. SHERMAN: I would ask the Court at this time --
3 and I will get you a copy of it in a moment -- to proceed
4 with the procedure in Section 851 of Title 21, which has to
5 take place before the pronouncement of sentence.

6 THE COURT: What section is it, Mr. Sherman; and
7 please give me a copy of --

8 MR. SHERMAN: Title 21, Section 851, your Honor, and
9 specifically, Subsection (b) about affirmation or denial of
10 previous conviction.

11 THE COURT: Let me read the Section 851 to you, for
12 the benefit of Mr. Okay and Mr. Forbes.

13 "(a), (1), No person who stands convicted of an
14 offense under this part shall be sentenced to increased
15 punishment by reason of one or more prior convictions,
16 unless before trial, or before entry of a plea of guilty,
17 the United States Attorney files an information with the
18 Court and serves a copy of such information on the person or
19 counsel for the person stating in writing the previous
20 convictions to be relied upon. Upon a showing by the U.S.
21 Attorney that facts regarding prior convictions could not
22 with due diligence be obtained prior to trial or before
23 entry of a plea of guilty, the court may postpone the trial
24 or the taking of the plea of guilty for a reasonable period
25 for the purpose of obtaining such facts. Clerical mistakes

1 in the information may be amended at any time prior to the
2 pronouncement of sentence.

3 "(2), an information may not be filed under this
4 section if the increased punishment which may be imposed is
5 imprisonment for a term in excess of three years unless the
6 person either waived or was afforded prosecution by
7 indictment for the offense for which such increased
8 punishment may be imposed.

9 "(b), if the United States attorney files an
10 information under this section, the Court shall after
11 conviction but before pronouncement of sentence, inquire of
12 the person with respect to whom the information was filed
13 whether he affirms or denies that he has been previously
14 convicted as alleged in the information, and shall inform
15 him that any challenge to a prior conviction which is not
16 made before sentence is imposed may not thereafter be raised
17 to attack the sentence."

18 MR. SHERMAN: In that regard I am handing up the
19 Amended Information that was filed on November 6th, 2000, a
20 copy of which was given to Mr. Schiano.

21 (There was a pause in the proceeding.)

22 THE COURT: What I'm doing, Mr. Okay, I was just
23 reviewing the transcript to see if in his plea of guilty
24 under oath your client acknowledged the prior felony
25 conviction as a felon in possession.

1 It appears, however, he acknowledged the reckless
2 endangerment conviction.

3 MR. SHERMAN: I think that's correct, your Honor,
4 because it was the reckless endangerment that was set forth
5 in the 922(g) indictment.

6 To the extent that there's a question -- although I
7 think we may have discussed this before -- I do have a
8 certificate of disposition from Kings County with regard to
9 this conviction.

10 THE COURT: Let me read you the section, Mr. Okay,
11 since I don't know if you brought your book with you.

12 It says, "Denial, written response, hearing. If a
13 person denies any allegation of the information of prior
14 conviction, or claims that any conviction alleged is
15 invalid, he shall file a written response to the
16 information. A copy of the response shall be served upon
17 the United States Attorney. The Court shall hold a hearing
18 to determine any issues raised by the response which would
19 except the person from increased punishment. The failure of
20 the United States Attorney to include in the information the
21 complete criminal record of the person or any facts in
22 addition to the convictions to be relied upon shall not
23 constitute grounds for invalidating the notice given in the
24 information required by subsection (a)(1) of this section.
25 The hearing shall be before the Court without a jury and

1 either party may introduce evidence. Except as otherwise
2 provided in paragraph 2 of this subsection, the United
3 States Attorney shall have the burden of proof beyond a
4 reasonable doubt on any issue of fact. At the request of
5 either party the Court shall enter findings of fact and
6 conclusions of law.

7 Subdivision (2), "A person claiming that a
8 conviction alleged and the information was obtained in
9 violation of the Constitution of the United States shall set
10 forth his claim, and a factual basis therefor, with
11 particularity in his response to the information. The
12 person shall have the burden of proof by a preponderance of
13 the evidence on any issue of fact raised by the response.
14 Any challenge to a prior conviction not raised by response
15 to the information before an increased sentence is imposed
16 in reliance thereon shall be waived unless good cause be
17 shown for failure to make a timely challenge.

18 Subdivision (d), "If the person files no response to
19 the information, or if the Court determines after hearing
20 that the person is subject to increased punishment by reason
21 of prior convictions, the Court shall proceed to impose
22 sentence upon him as provided by this part."

23 Mr. Sherman, before we proceed, since this issue may
24 not have been anticipated by Mr. Okay, what is the effect of
25 the information?

1 MR. SHERMAN: Well, first of all, your Honor, this
2 is in fact what enables the Court to impose a life sentence
3 in this case because it increases the penalty of the drug
4 counts, and specifically Count 1.

5 In addition, with regard to whether or not it was
6 anticipated, I would note, first of all, on the cover page
7 of the presentence report it states in bold letters, right
8 underneath the Count 1 description, that there was an
9 amended Section 851 information filed with regard to that
10 count. That is what I handed up to the Court.

11 I would also note that paragraph 54 on page 12 of
12 the PSR describes the conviction that we're talking about;
13 and as the Court has already determined from the defense,
14 there was no objection to that being in the PSR or the
15 accuracy of it.

16 THE COURT: I understand that. However, I do
17 recognize that Mr. Okay came in this case late.

18 Mr. Okay, since it means -- since it's obviously
19 significant to your client, Mr. Sherman is representing that
20 he has the certificate of conviction. It would appear from
21 my reading of the statute it would be the government's
22 burden of proof that beyond a reasonable doubt the Dennis
23 Forbes who stands before me now was in fact convicted of
24 this crime. It would be Dennis Forbes' burden to prove any
25 constitutional challenge; for example, ineffective

1 assistance of counsel.

2 So I do want to give you a moment to talk to your
3 client, since it is significant, and to tell me what your
4 client wishes to do.

5 MR. OKAY: All right.

6 (There was a pause in the proceeding.)

7 MR. OKAY: Your Honor, I have made inquiry of my
8 client, and he is ready, if the Court wants, to continue.
9 He indicated he is the Dennis Forbes, and he was convicted
10 in Kings County.

11 THE COURT: Let me explain something, Mr. Forbes, so
12 you know. I think we may have explained this before with
13 Mr. Schiano; but I am mindful that you went through Mr.
14 Schiano, Mr. Wicks, represented yourself on a motion to
15 withdraw, and then Mr. Okay, who has been good enough to
16 accept assignment in this case.

17 If in fact you are the Dennis Forbes who was
18 convicted of this crime, it ups the ante; in other words, it
19 makes the guideline range life. Do you understand that?

20 THE DEFENDANT: Yes.

21 THE COURT: If you were not the Dennis Forbes, but
22 for this conviction, if you weren't -- if you were not the
23 person who was convicted of this crime, then under the
24 guidelines under the law, the sentencing range I could give
25 you is --

1 Mr. Lyons, 10 to life?

2 PROBATION OFFICER LYONS: I believe that is correct,
3 your Honor.

4 MR. SHERMAN: Your Honor, I think the guideline is
5 not changing. What's changing is the mandatory minimum.
6 Because of this conviction, his mandatory minimum is 20 to
7 life instead of 10; but his guideline maximum is still life.

8 THE COURT: So what you're saying to me, Mr.
9 Sherman, is it changes the statutory minimum.

10 MR. SHERMAN: Correct.

11 THE COURT: Your guideline is still life. I
12 would -- so it really in no way affects the sentence I could
13 give.

14 MR. SHERMAN: No. It only affects if after appeal
15 Mr. Forbes happens to be successful. We establish that the
16 851 information was valid; and therefore, if it ever becomes
17 relevant, there was a 20-year statutory minimum.

18 THE COURT: Do you understand that, Mr. Forbes?

19 MR. OKAY: Your Honor, if I can take a minute I can
20 explain it to him. If we could go back here and sit down?

21 THE COURT: Absolutely, Mr. Okay.

22 (There was a pause in the proceeding.)

23 THE COURT: The Court notes that Mr. Okay has had
24 the opportunity to confer with Mr. Forbes.

25 As I indicated, Mr. Okay, while Mr. Sherman is

1 correct, notice was given on the presentence report as to
2 the filing of the information, I am mindful that you stepped
3 in at the last minute and certainly will accord you every
4 courtesy in that record if your client wants to contest that
5 issue. Does he want to contest it?

6 MR. OKAY: Your Honor, based on my discussion with
7 him right now, I explained to him the penalties under the
8 statute and the penalties under the guideline, how the
9 guideline calculation that we have was arrived at, a level
10 43, I believe in the Court's finding, and criminal history
11 category of III. This conviction in '87 is too old to
12 affect his criminal history category. It's not going to
13 affect that.

14 The only question is if he is the same Dennis Forbes
15 and if the Dennis Forbes has the challenge to the plea in
16 Kings County in '87, what that does is up the mandatory
17 minimum for the sentence, that the least sentence you can
18 get under the guidelines is 20 years. If he is not the
19 Dennis Forbes and he has a constitutional challenge, that
20 puts it at 10. If that's based on the trial and this
21 Court's understanding of the guidelines, the guidelines
22 won't allow us to reach the minimum. I think Mr. Forbes
23 understands this.

24 I want to point out, a lot of lawyers don't
25 understand a lot of this. I don't want to force this on Mr.

1 Forbes now, but basically what I explained to him is it
2 doesn't make any difference. The guideline calculations
3 don't make any different. 43 --

4 THE COURT: Is it 43 or 45?

5 MR. SHERMAN: I think the two points only come off
6 the drug case.

7 THE COURT: It's 45, right.

8 MR. OKAY: 43, 45, it's still life.

9 THE COURT: You're correct.

10 MR. OKAY: It's an academic conversation. And based
11 on the discussion, Mr. Forbes -- and I'll let Mr. Forbes
12 speak for himself -- he's not interested in contesting, and
13 he will admit that he is the same Dennis Forbes who was
14 convicted in Kings County in 1987.

15 THE COURT: Is that correct, Mr. Forbes?

16 THE DEFENDANT: Yes, your Honor.

17 THE COURT: Are you the same Dennis Forbes who was
18 in fact convicted on or about September 2nd, 1987, in Kings
19 County Supreme Court in Kings County, New York, of the Class
20 C felony of attempted sale of a controlled substance in the
21 third degree; are you the same person?

22 THE DEFENDANT: Can I ask you a question?

23 THE COURT: Yes.

24 THE DEFENDANT: Do you mean if I'm the same person
25 in the same frame of mind or --

1 THE COURT: No, you are the same person?

2 THE DEFENDANT: Yes.

3 THE COURT: The Court notes it has satisfied the
4 information and we can proceed.

5 As I indicated you do have, Mr. Forbes, by my count,
6 four prior convictions. We went through the resisting
7 arrest, the reckless endangerment first, a felony conviction
8 for which you received a sentence of 28 months to five
9 years.

10 Finally, you've been convicted -- it appears you
11 have three prior convictions. I may have misspoken and said
12 four, but you have three prior convictions, the three I
13 recited. So this makes the subject offense your fourth
14 criminal conviction.

15 In any event, Mr. Forbes, as you know sentencing in
16 this action is pursuant to the Sentencing Reform Act of
17 1984. As indicated, Mr. Okay has received a copy of the
18 revised Presentence Investigation Report and reviewed it
19 with you. Additionally, you've indicated that you've read
20 the report yourself.

21 The Court has previously ruled on the five
22 objections you made to the Presentence Investigation Report.
23 The Court otherwise adopts the statements contained in the
24 Presentence Investigation Report as its findings of fact.

25 Accordingly, the Court finds as to indictment

1 99-CR-6089, Count 1 and 3, as follows: Your base offense
2 level is 38. Pursuant to U.S.S.G. Section 2D1(b)(1), there
3 is a two-level increase because of your possession of a
4 handgun. That raises your offense level to 40.

5 Pursuant to U.S.S.G. Section 3B1.1(a), there is a
6 four-level increase since you were an organizer and leader
7 who employed more than five individuals. That raises your
8 offense level to 44.

9 There is an additional one-point enhancement because
10 you employed a minor in your crime of conviction on Count
11 No. 3 pursuant to the Guideline Section 2D1.2(a)(2), which
12 raises your total offense level on Counts 1 and 3 of
13 indictment 99-CR-6089 to 45.

14 As to the indictment to which you pled, 99-CR-6084,
15 your base offense level is 20. There's a two-level
16 enhancement pursuant to Guideline Section 2K2.1(b)(4) since
17 the gun was stolen, which brings you to a 22.

18 There is a four-level enhancement pursuant to
19 Guideline Section 2K2.1(b)(5) since you possessed a firearm
20 during the time you were engaged in distributing cocaine,
21 which raises it to a 26.

22 Your total offense level on the second indictment is
23 26; however, Counts 1 and 3 of the first indictment are
24 grouped based on the amount of drugs involved. The
25 guideline calculations are nine levels more serious than for

1 the plea of guilty to the felon in possession of a firearm
2 charge. In accordance with Guideline Section 3D1.4(c), the
3 offense level for Counts 1 and 3 becomes the total offense
4 level, becomes controlling.

5 That means your total offense level is 45, your
6 criminal history category is III, based on four total
7 criminal history points.

8 So based on those calculations, Mr. Forbes, my
9 options under the guidelines are as follows: Your
10 imprisonment range is life for all counts of both
11 indictments considered together. You're looking at
12 supervised release on Counts 1 and 3 of Indictment 6089 of
13 at least 10 years, three years on Indictment 6084. You are
14 not eligible for probation. Your fine range on both
15 indictments for all counts considered together is 25,000 to
16 4 million. There is no issue of restitution; and you must
17 pay a \$100 special assessment for your conviction of each
18 felony, which totals 300.

19 So, Mr. Forbes, those are my options.

20 Mr. Forbes, on deciding on an appropriate sentence,
21 the Court has carefully considered all the facts and
22 circumstances surrounding your conviction, as well as the
23 objectives of sentencing, including punishment and
24 deterrence.

25 Mr. Forbes, I will tell you to your face, I agree

1 with Mr. Sherman's statement of your conduct. You effected
2 a lot of lives; not only the lives of people who bought your
3 cocaine base and marijuana that you were responsible for
4 putting on the street, but also the lives of the individuals
5 that you utilized in your distribution network.

6 I went back and looked carefully at this entire
7 case, and I found correspondence that you sent to me. And I
8 specifically noted this. You sent me a letter that's dated
9 April 12th of 2001.

10 "Honorable Judge Siragusa: In these documents that
11 I am sending you, two of them are my oldest daughter asking
12 you to have a heart as a just judge.

13 "There is a lot of things that are said about me to
14 you by the officers; but if you based what they say as
15 knowing me, then this means your mind is already set against
16 me and my family.

17 "I can't change the outcome of my prior conviction.
18 If I could, I would; but I'm trying to change a lot of
19 things about my life. That's why I established a business
20 with my wife and work so my kids can see that working can
21 get you anything you want in life as well as being their
22 role model to my kids and family.

23 "I feel strongly that my conviction is based
24 entirely on my prior conviction. That is why I'm going to
25 jail, and with the help of the officers who did everything

1 to ensure that I'm behind bars, showed that there is no
2 justice for -- I can't read the word -- maybe "African
3 people. The officers have turned so many people against me
4 it makes sense why the case went the way it did and my
5 conviction.

6 "The other papers explain my case, the arrest
7 procedure, along with my due process and constitutional
8 violations that were the strength of my case getting
9 dismissed, which never took place. You as the Judge, can
10 you do something about it knowing that you have the power to
11 make it right?"

12 Now, here's the letters you sent to me from your
13 daughters. "Dear Sorrogusto, my name is Shanah Forbes, the
14 oldest daughter from my dad, Dennis Anthony Forbes. I pray
15 every day for my dad to come home to us. My dad loves us a
16 lot and we love him unconditional. I miss playing with him.
17 Now that I'm getting older I need him more for everything.
18 Please help my dad so he can be with us again and we can
19 have a happy family again. Thank you, Shanah Forbes."

20 "Dear Judge Siragusa, I love my dad. My dad's name
21 is Dennis Anthony Forbes. My dad takes good care of me. We
22 go to a lot of fun places like Disney World and Six Flags,
23 etc. I miss my dad. He is not a bad person. He is a very
24 good and a loving person to everyone. Please help my dad
25 and make him come home. We miss him a lot. Thank you,

1 Shaquana Forbes."

2 THE COURT: Mr. Forbes, I don't know what you mean
3 by your prior conviction led to your conviction. It didn't.
4 I sat on the case. The evidence of your involvement in the
5 conspiracy for which you were convicted was, frankly,
6 overwhelming. The jury felt there was not proof -- at least
7 some of them felt there was not proof beyond a reasonable
8 doubt on the gun charge, which resulted in the hung jury.

9 I am flabbergasted that you write that you're a role
10 model for your children. You have your children write
11 letters to me. It's truly amazing to me, Mr. Forbes. It
12 just puts the accent mark on something Mr. Sherman said.
13 You have no remorse for what you've done.

14 I think, what if your kids got the drugs that you
15 put on the street. Do you think about that? Your daughter
16 says you take her to a lot of fun places like Disney World;
17 and you know what pops into my mind? How did you pay for
18 it? It seems that perhaps the money you got to pay for it
19 came from your illegal means.

20 I don't have to base my sentence on that. All I
21 have to base my sentence on is the person who appears before
22 me and who has appeared before me many times; the person who
23 used others, minors, to distribute cocaine base, crack, to
24 people on the streets, obviously with the callous disregard
25 for the effect the narcotics would have on the people who

1 use them and also on the lives of their loved ones.

2 It always amazes me, Mr. Forbes, how a person like
3 you with kids whom I assume you love -- I don't question
4 that for a moment; I believe you love your children -- how
5 you can be oblivious to the fact that the narcotics you put
6 on the street get into the hands of young people. I can
7 only guess how you'd feel toward the person who might
8 someday put drugs in the hands of your kids. I would assume
9 as a father you would have no patience with them and your
10 feelings might -- might and probably would -- run a lot
11 stronger.

12 But the really amazing thing is you have shown
13 absolutely no remorse -- none, zero, zilch -- for a crime
14 that is the scourge of our contemporary society.

15 Pursuant to the Sentencing Reform Act of 1984, it is
16 the judgment of this Court that you, Dennis Forbes, are
17 hereby committed to the custody of the Bureau of Prisons to
18 be imprisoned for the term of life on Counts 1 and 3 of
19 Indictment 99-CR-6089. In addition, you are sentenced to a
20 term of 120 months on Count 1 of Indictment 99-CR-6084. All
21 such terms of imprisonment are to be served concurrently.

22 It is further ordered that you shall pay a fine of
23 \$1,000 on Count 1, \$1,000 on Count 3, and \$1,000 on
24 Indictment 99-CR-6084, for a total of \$3,000. Interest on
25 the fine is waived. The fine payment shall be made from any

1 wages you may earn in prison in accordance with the Inmate
2 Financial Responsibility Program.

3 It is further ordered that you should pay to the
4 United States a special assessment of \$100 on Count 1, 100
5 on Count 3, and 100 on indictment 99-6084, for a total of
6 \$300.

7 Upon release from the Bureau of Prisons, if that
8 ever happens, on Count 6084, you would be placed on
9 supervised release for a period of three years. Within 72
10 hours of your release from the Bureau of Prisons you shall
11 report in person to the probation office in the district to
12 which you are released.

13 I want to explain something. If the conviction
14 stands up on the first indictment, that is the gun, and for
15 some reason an appellate court may reverse the drug
16 conviction, your conviction on Indictment No. 6084 will
17 still stand. In that event, though unlikely, hopefully, as
18 it will be, you shall be placed on supervised release for
19 three years.

20 While on supervised release you shall not commit
21 another federal, state, or local crime. You shall also
22 complied with the standard conditions that have been adopted
23 by this Court, as well as the following special conditions:

24 You shall participate in a drug and alcohol
25 treatment program under a co-payment plan, which may include

1 urine testing, as approved by the probation officer. If
2 treatment is recommended, you are not to leave your
3 treatment unless approved by both your counselor and the
4 U.S. Probation officer.

5 You shall submit to a search of your person,
6 property, vehicle, and personal residence, or other others
7 under your control, conducted as determined by the probation
8 officer.

9 I instruct you pursuant to Rule 32(c)(5) of the
10 Federal Rules of Criminal Procedure, you are advised of your
11 right to appeal the sentence imposed as to both indictment
12 number 99-6089 and 99-6084. If you are unable to pay the
13 cost of an appeal you may apply for leave to appeal as a
14 poor person.

15 That is the sentence of this Court.

16 Anything else, counsel?

17 MR. SHERMAN: Your Honor, in light of we're now
18 having reached sentencing, pursuant to the representation I
19 made at the time of Mr. Forbes' plea, I will move to dismiss
20 Count 2 of 99-CR-6089, which is the 924(c) count.

21 THE COURT: That count is dismissed.

22 MR. OKAY: Thank you very much, Judge.

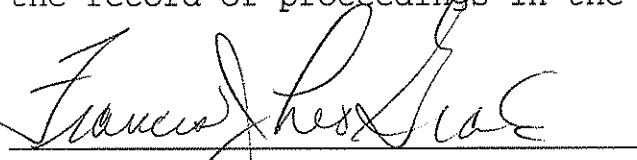
23 (The court was adjourned.)

24 * * *

25

CERTIFICATE OF REPORTER

I certify that the foregoing is a correct transcript of
the record of proceedings in the above-entitled matter.



Francis J. LeoGrande
Official Court Reporter



Date